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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 6[redacted]32

SECURITY MORTGAGE COMPANY,
Petitioner,

vs.

CHARLES A. POWERS, TREASURER OF RAPPAHANNOCK FOR FISCAL PURPOSES COMMONWEALTH, RAPPAHANNOCK,
Respondent.

Petition for Writ of Certiorari and Brief in Support of Petition.

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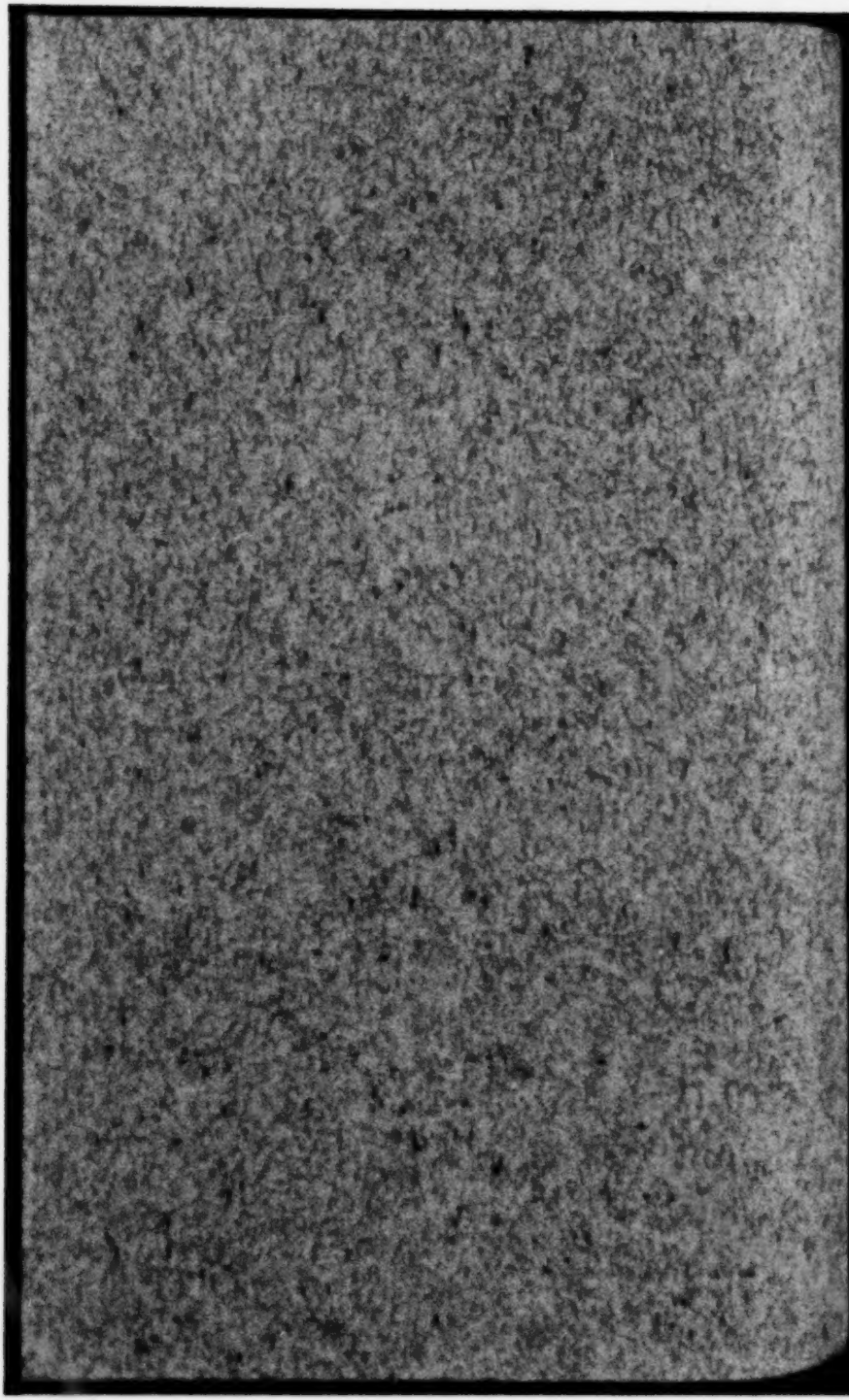

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OCTOBER TERM, 1927.

No.

SECURITY MORTGAGE COMPANY,
Petitioner,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT,
Respondent.

Petition for Issuance of a Writ of Certiorari.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Security Mortgage Company, a corporation organized under the laws of the State of Georgia, respectfully represents:

1. That on February 24, 1925, it loaned Ninety

Thousand Dollars ($90,000.00) to Hanson Motor Company, a corporation, and took from said company its promissory note for that amount, secured by a loan deed covering land located in Fulton County in the State of Georgia. Said note was payable, as to principal, on February 24, 1930, and bore ten interest coupon notes, for the payment of interest, semi-annually, at 7 per cent, said coupon notes being each for the sum of $3,150. It was provided in said principal note, and in each of the several coupon notes attached, that in case of failure of payment when due all the other notes outstanding, bearing even date and given for the same intent and purpose, should, at the option of the holder, become due and collectible. Said principal note, and each of said coupon notes attached thereto, and the loan deed, contained the agreement of Hanson Motor Company to pay said note when due "with all costs of collection, including ten per cent as attorneys fees, if collected by law or through an attorney at law."

2. By the law of Georgia, in the event of a default of payment, your petitioner had the right, under this contact, after notice, to bring suit against the maker, Hanson Motor Company, and to recover judgment for the amount so contracted to be paid. Under such law, also, the petitioner, under said loan deed, obtained and held a lien on the real estate described therein, to secure the full payment of the amount which at any time should become due under the contract evidenced by said principal note, coupon notes and loan deed.

3. After the giving of said notes, and the making of said loan deed, Hanson Motor Company conveyed said real estate, burdened by the lien created by said

loan deed, to Florida Furniture Corporation, a corporation organized under the law of the State of Florida.

4. Thereafter, on January 7, 1926, said Florida Furniture Corporation was adjudicated a bankrupt, in the United States District Court for the Southern District of Florida.

5. Thereafter, in ancillary proceedings, in the United States District Court for the Northern District of Georgia, on January 11, 1926, a receiver was appointed, and took possession of the real estate covered by said loan deed. The case was referred to Harry Dodd, Referee in Bankruptcy, of Atlanta, Georgia, for ancillary administration of the assets in his jurisdiction.

6. On February 24, 1926, one of the coupon interest notes aforesaid became due and was not paid. Thereafter, on April 1, 1926, your petitioner exercised its option to declare the principal note due and collectible, and gave notice to the Hanson Motor Company of its intention to bring suit on said note and attached coupon in the City Court of Atlanta, Georgia, and to claim, in said suit, the attorneys' fees provided for, as aforesaid.

7. On April 13, 1926, your petitioner, having complied with all requirements of law, did bring suit in said City Court of Atlanta, on said notes, claiming the amount due thereon, principal and interest, and 10 per cent attorneys' fees, as provided therein. Thereafter, on May 4, 1926, judgment was rendered in said court in favor of your petitioner and against said Hanson Motor Company for the principal sum of $93,150, the sum of $1,274, interest to that date, $9,442.40 attorneys' fees, and $15.84, costs of court.

8. In the meantime, on March 12, 1926, Charles A. Powers, who had been elected, and had qualified as trustee of the estate of Florida Furniture Corporation, bankrupt, as aforesaid, in the United States District Court for the Southern District of Florida, applied to the Referee in Bankruptcy, aforesaid, for an order to sell the real estate covered by said loan deed "either free from liens or subject to the lien of Security Mortgage Company."

Your petitioner, on or about that date, was served with an order to show cause why the application should not be granted. It did not seek to show any cause. Before the making of the application of the trustee, however, the Hanson Motor Company, in the United States District Court for the Southern District of Florida, made a motion to vacate the adjudication of bankruptcy, which motion was pending when the application of the trustee, aforesaid, was made. The fact that the application had been made having been called to the attention of that court, an order was made, on April 6, 1926, directing the trustee not to proceed further with the application made by him, as aforesaid, till the further order of that court.

This order remained in force till on or about May 14, 1926, when it was vacated by the court. Thereupon, on May 14, 1926, the Referee aforesaid granted the trustee's application, made as aforesaid, and entered an order directing that on May 28, 1926, the Referee should make sale of the real estate, after advertisement, by public sale "free from all liens, especially from the lien claimed by the Security Mortgage Company, preserving the rights of the Security Mortgage Company to claim the proceeds of said sale in the hands of the trustee," and to report to the court

for confirmation the highest and best and most acceptable bid obtained.

On May 28 the trustee offered the real estate for sale, but no satisfactory bid was received, and no sale was made. On June 2, 1926, the trustee, having renewed application for an order to sell, the Referee made another order directing the trustee, on June 12, 1926, to sell said real estate "free from all liens * * * to the highest and best bidder, subject to confirmation. The rights of all lien creditors preserved in the proceeds."

Under this order the trustee, on June 12, 1926, offered the property for sale free of all liens. The sale was adjourned until June 14, 1926. On that date bids were received for the property from two bidders. The highest and best bid was that of your petitioner, which bid for the property, free of liens, $112,500. Sale was accordingly made to your petitioner, subject to confirmation.

This bid was reported to the Referee, who, on June 15, 1926, made an order confirming the sale, and directing the trustee to make conveyance of the property to your petitioner free of all liens. Said order provided in part as follows:

> "It is agreed in open Court and so ordered that the lien of the petitioner attaches to the proceeds of the sale and that settlement with the trustee may be had by the cancellation of the lawful liens held by the purchaser against said property without the necessity of actually paying the whole amount in cash. It is provided, however, that the amount of said lien is not adjudicated by this order."

9. Your petitioner thereupon presented to the Referee its petition setting forth the amounts of the sev-

eral liens held by it upon said real estate, including its lien under the loan deed aforesaid, declared by judgment, as aforesaid, and prayed that an order be made declaring said several liens to be prior liens upon the real estate in question or upon any funds derived from the sale thereof, and that said liens be allowed as credits against the amount bid by the petitioner for said real estate, as provided in the order of confirmation aforesaid.

The trustee filed objection to the allowance of the lien claimed under the loan deed, so far as the same was represented by the aforesaid item of $9,442.40 attorneys' fees. The Referee, however, allowed the liens claimed, including said item for attorneys' fees, on June 25, 1926.

The trustee thereupon appealed from the order of the Referee to the United States District Court for the Northern District of Georgia. On July 26, 1926, said court sustained the appeal of the trustee, and overruled the order of the Referee, so far as it allowed your petitioner's claim as a lien on said real estate for said $9,442.40 attorneys' fees, and denied your petitioner's claim of lien under said loan deed, except for principal, interest and costs.

Your petitioner thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit from said order disallowing said lien for attorneys' fees. On October 25, 1927, said Circuit Court of Appeals denied your petitioner's appeal, and rendered judgment affirming the order appealed from.

10. Your petitioner by said judgment, if the same shall not be corrected, will be deprived of a lien upon said real estate securing its claim for attorneys' fees aforesaid, which lien exists by virtue of the loan deed

aforesaid, made and recorded before Florida Furniture Corporation was adjudicated bankrupt, and before it purchased said real estate burdened by said loan deed. Under the law of Georgia said lien is effective as of the date when the loan deed was made.

11. Your petitioner further says that the opinion of the Circuit Court of Appeals contains the following paragraphs:

> "Appellant relies upon the provision of the Georgia code, par. 6037, permitting transfers of real estate burdened by a mortgage and deed of trust to be disregarded by the mortgage creditor and allowing suit to be brought against the original debtor, and cites *John M. Mitchell Life Insurance Co. vs. Ross, Receiver*, 162 Ga. 654, and *Scott vs. Paisley*, 271 U. S. 632. We conclude that this is beside the issue.
>
> "The attorneys' fees claimed were not a fixed liability at the time of bankruptcy and became a lien on the property, if at all, merely by virtue of the judgment of the State Court. There is no doubt that the property passed into the custody of the District Court sitting in bankruptcy with the adjudication and no other court had jurisdiction to impress it with a lien not then in existence. *Murphy vs. John Hoffman Co.*, 241 U. S. 586; *In Re Joseph Weber*, 219 F. 417; *In Re Jno. T. Moore Planting Co.*, 237 F. 737."

Your petitioner further says that the ruling so made below is in conflict with the applicable local decisions of the Supreme Court of Georgia, and that the ruling that said decisions were not applicable and controlling is untenable.

Your petitioner further says that the Circuit Court of Appeals has misconstrued and misapplied the Fed-

eral Bankruptcy Act in making the decision herein sought to be reviewed.

The questions of local, general, and federal law thus presented in this case are of much importance, and of such character that it is probable that they will frequently arise in other cases. Those questions have never yet been passed upon by this Court. For these reasons, as well as to remedy the wrong done to your petitioner, a writ of certiorari should issue in this case.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals of the Fifth Circuit and to the Clerk of said Court, commanding said Court and said Clerk to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of said Court in said case, being No. 5012, *Security Mortgage Company vs. Charles A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, Bankrupt*, to the end that said case may be reviewed and determined by this Court, as provided by law, and that said judgment of said Circuit Court of Appeals may be reversed by this Court, and that your petitioner may have such other and further relief or remedy as may be just.

SECURITY MORTGAGE COMPANY,
By its Attorneys,
ALDINE & HEWITT W. CHAMBERS,
JOHN E. BENTON.

District of Columbia, Washington, ss:

JOHN E. BENTON, being duly sworn says that he is one of counsel for Security Mortgage Company, and

that he has read the foregoing petition, and that the allegations thereof are true, as he verily believes.

JOHN E. BENTON.

Subscribed and sworn to this 23rd day of December, 1927, before me.

CLYDE S. BAILEY,
Notary Public within and for the District of Columbia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No.

SECURITY MORTGAGE COMPANY

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT.

Brief in Support of Petition for Issuance of a Writ of Certiorari.

REFERENCE TO OPINIONS BELOW.

The petitioner in this case seeks review of a judgment of the Circuit Court of Appeals, Fifth Circuit, in *Security Mortgage Company v. Charles A. Powers, Trustee*, affirming a judgment of the United States District Court for the Northern District of Georgia. The opinion of the District Court has not been officially reported. The opinion of the Circuit Court of Appeals is reported, 21 (2d) F. 965, Advance Sheets November 8, 1927, No. 10.

STATEMENT OF GROUNDS OF JURISDICTION INVOKED.

The judgment of said Circuit Court of Appeals sought to be reviewed was rendered October 25, 1927. (R. 62) In the Circuit Court of Appeals and in the

District Court the petitioners claimed to be entitled to a lien on real estate located in Fulton County, Georgia, for the amount due to it on a certain promissory note, secured by a loan deed covering said real estate, including attorneys' fees as therein stipulated. (R. 30-37, 47)

The petitioner's lien, including said item of attorneys' fees, had been recognized and allowed by the Referee in Bankruptcy. (R. 37) It was disallowed by the District Court (R. 50), and the judgment of the District Court was affirmed by the Circuit Court of Appeals. (R. 61-62)

The jurisdiction of this court is invoked under the provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petitioner loaned $90,000 to Hanson Motor Company on February 24, 1925, upon the promissory note of the latter, secured by a loan deed, of the same date, covering real estate in Fulton County, Georgia. The principal note, each with interest coupon note attached, and the loan deed all provided for the payment of ten per cent attorneys' fees if the indebtedness should be collected by law or through an attorney at law. The note also provided that on default in payment of interest, on demand, the entire indebtedness should become due. (R. 31, 32, 35, 46, 48)

Florida Furniture Corporation purchased the equity in said real estate from Hanson Motor Company subject to the petitioner's lien. (R. 48 and 51) That corporation was thereafter adjudicated a voluntary bankrupt, on January 6, 1926, in the District Court for the

Southern District of Florida. (R. 6) On January 11, 1926, in ancillary proceedings in the District Court for the Northern District of Georgia, a receiver was appointed, and he took possession of the real estate in question. (R. 7, 48, 49) On February 24, 1926, a default occurred in payment of interest. On April 13, the petitioner, having given notice, as required by law of its intention so to do, brought suit in the City Court of Atlanta against *Hanson Motor Company* to recover the debt secured by the loan deed, principal and interest, and ten per cent attorneys' fees. On May 4, 1926, it recovered judgment for said debt, and for attorneys' fees amounting to $9,442.40. The judgment was declared a special lien on the real estate in question. (R. 48)

In the meantime, on March 12, 1926, Charles A. Powers, who had been elected and had qualified as trustee of the estate of Florida Furniture Corporation, bankrupt, as aforesaid, in the District Court for the Southern District of Florida, applied to the Referee in Bankruptcy, aforesaid, for an order to sell the real estate covered by said loan deed " either free from liens or subject to the lien of Security Mortgage Company". (R. 10-14)

The petitioner, on or about that date, was served with an order to show cause why the application should not be granted. (R. 15) It did not seek to show any cause. (R. 46) Before the making of the application of the trustee, however, the Hanson Motor Company, in the District Court for the Southern District of Florida, made a motion to vacate the adjudication of bankruptcy, which motion was pending when the application of the trustee, aforesaid, was made. The fact that the application had been made having been called

to the attention of that court, an order was made, on April 6, 1926, directing the trustee not to proceed further with the application made by him, as aforesaid, till the further order of that court. (R. 81)

This order remained in force till on or about May 14, 1926, when it was vacated by the court. Thereupon, on May 14, 1926, the Referee aforesaid granted the trustee's application, made as aforesaid, and entered an order directing that on May 28, 1926, the trustee should make sale of the real estate, after advertisement, by public sale "free from all liens, especially from the lien claimed by the Security Mortgage Company, preserving the rights of the Security Mortgage Company to claim the proceeds of said sale in the hands of the trustee," and should report to the court for confirmation the highest and best and most acceptable bid obtained. (R. 17)

On May 28 the trustee offered the real estate for sale, but no satisfactory bid was received, and no sale was made. (R. 19) On June 2, 1926, the trustees having renewed application for an order to sell, the Referee made another order directing the trustee, on June 12, 1926, to sell said real estate "free from all liens * * * to the highest and best bidder, subject to confirmation. The rights of all lien creditors preserved in the proceeds." (R. 20)

Under this order the trustee, on June 12, 1926, offered the property for sale free from all liens. The sale was adjourned until June 14, 1926. On that date bids were received for the property from two bidders. The highest and best bid was that of the petitioner, which bid for the property, free of liens, $112,500. Sale was accordingly made to your petitioner, subject to confirmation. (R. 21)

This bid was reported to the Referee, who, on June 15, 1926, made an order confirming the sale, and directing the trustee to make conveyance of the property to the petitioner free of all liens. Said order provided in part as follows:

> "It is agreed in open Court and so ordered that the lien of the petitioner attaches to the proceeds of the sale and that settlement with the trustee may be had by the cancellation of the lawful liens held by the purchaser against said property without the necessity of actually paying the whole amount in cash. It is provided, however, that the amount of said lien is not adjudicated by this order." (R. 28)

The petitioner thereupon presented to the Referee its petition setting forth the amounts of the several liens held by it upon said real estate, including its lien under the loan deed aforesaid, represented by the judgment aforesaid, and prayed that an order be made declaring said several liens to be prior liens upon the real estate in question or any funds derived from the sale thereof, and that said liens be allowed as credits against the amount bid by the petitioner for said real estate, as provided in the order of confirmation aforesaid. (R. 30-37)

The trustee filed objection to the allowance of the lien claimed under the loan deed, so far as the same was represented by the aforesaid item of $9,442.40, attorneys' fees. (R. 37-44) The Referee, however, allowed the liens claimed, including said item for attorneys' fees, on June 25, 1926, and ordered the same "paid out of the proceeds from the sale of real estate." (R. 37)

The trustee thereupon appealed from the order of the Referee to the District Court for the Northern District of Georgia. (R. 44)

On July 26, 1926, said court sustained the appeal of the trustee, and overruled the order of the Referee, so far as it allowed the petitioner's claim to a lien for said $9,442.40 attorneys' fees, and denied the petitioner's claim of lien under said loan deed, except for principal, interest and costs. (R. 50)

The petitioner thereupon appealed to the Circuit Court of Appeals, Fifth Circuit, from said order disallowing said lien for attorneys' fees. (R. 52) On October 25, 1927, the Circuit Court of Appeals denied the appeal, and rendered judgment affirming the order appealed from. (R. 61-62)

SPECIFICATION OF ERROR.

The affirmance by the Circuit Court of Appeals of the judgment of the District Court disallowing the petitioner's claim to a lien for said $9,442.40 attorneys' fees constitutes the sole error asserted and intended to be urged in this court.

ARGUMENT.

Summary.

Under the law of Georgia the petitioner's lien, as created by the loan deed to it, was unaffected by subsequent transfer of the equity in the property covered by said deed.

Under the law of Georgia attorneys' fees stipulated for in a note are a part of the principal indebtedness, and a lien securing the debt represented by the note secures also the attorneys' fees.

Section 67d of the Bankruptcy Act preserves the petitioner's lien.

Section 63d of the Bankruptcy Act has no application to the petitioner's claim.

Recognition of the petitioner's claim is in no way inconsistent with either the letter or the spirit of the Bankruptcy Act.

The judgment of the Circuit Court of Appeals is in conflict with applicable local decisions.

The judgment of the Circuit Court of Appeals is in conflict with the decisions of other federal courts.

Under the Law of Georgia the Petitioner's Lien, as Created by the Loan Deed to it, was Unaffected by Subsequent Transfer of the Equity in the Property Covered by Said Deed.

Under the law of Georgia the plaintiff held the *legal title* to the real estate in question as lienor. This lien existed by virtue of the loan deed, and from the date thereof, to wit, February 24, 1925,—a date long prior to the bankruptcy proceedings.

The trustee could take no more than the bankrupt had, which was an equity in the property subject to the lien aforesaid. This court expressed the rule in *York Manufacturing Co. v. Cassell*, 201 U. S. 352, as follows:

> "Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. * * * The trustee, under such circumstances, stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt. This is held in *Hewitt v.*

Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. The same view was taken in *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306."

The trustee having sold the property free from liens, under an order of the court preserving the rights of the lienor in the proceeds, the question arises as to the extent of the lien which the trustee must discharge out of the proceeds before any balance of them may be used as estate of the bankrupt. This is a question that must be decided in accordance with the local law of Georgia, which determines the validity and extent of Security Mortgage Company's lien. *Thompson v. Fairbanks*, 196 U. S. 522.

Under the law of Georgia the lien of the grantee under a loan deed is of such character that the receiver of one who has purchased property burdened with a lien, has no right to delay a levy on such property, after judgment has been obtained by the lienor against the maker of the loan deed. This was held in *John Hancock Life Insurance Co. v. Ross, Receiver*, 162 Ga. 654.

The receiver, or a trustee in bankruptcy, simply steps into the shoes of the owner of the equity. He takes the property subject to the liens placed thereon by such owner, or by any predecessor of his in title. When a lien exists to secure the performance of the contract of one who has given a loan deed, or a purchase money note, the rights of the lien holder can be in no way affected by a subsequent conveyance of the equity to a third party, or by the appointment of a receiver.

Upon default in performance of the contract the lienor has a right to proceed against his debtor, com-

plying, as to him, with the requirements of law, and wholly without regard to subsequent holders of the equity. This was held in this Court in a case which came up from Georgia, *Scott v. Paisley*, 271 U. S. 632. It is true even though such subsequent holder be a receiver of the debtor, appointed by a court of competent jurisdiction to take charge of, and administer, the assets for the benefit of creditors. The lien holder is under no obligation to such receiver to give him notice of intention to sue, which the law requires as to the debtor, nor to procure leave from the court which appointed the receiver, nor to name the receiver as a party to his action. The lienor is entitled to obtain judgment against his debtor according to his contract with him, and his judgment, so obtained, measures the extent of his lien. *Guarantee Trust & Banking Co. v. American National Bank*, 15 Ga. App. 778. In this case it was said:

> "The objection is two-fold—(1) that there is no provision of law by which attorneys' fees can be included so as to carry a lien provided by a contract, except for the principal and interest; and (2) that even if the defendant company could have been bound for the attorneys' fees if there had been no receiver there could be no lien in this case for no notice of intention to sue was ever served upon the receivers. It is admitted by the answer that timely written notice of the intention to sue and claim attorneys' fees was served upon the defendant company; and, although it is alleged that no such notice was ever served upon the receivers, we are of the opinion that no further notice than that given was necessary, for the law in reference to giving notice for the collection of attorneys' fees does not extend to receivers of the debtor."

The independent character of the proceeding to obtain judgment upon the contract secured by the lien was pointed out as follows:

> "A receiver is a mere servant of the court acting under orders from the court, and *his* compliance with the terms of a debtor's conditional contract to pay attorneys' fees would perhaps be unenforceable because it would be impossible for a receiver to comply with the terms of the notice and pay the principal and interest of the debt on or before the last return day. * * * There was no difficulty, however, in the way of the directing of a verdict *as against the maker of the notes* in the present case because the maker admitted service of the notice, and *so far as the obligation of the maker of a note whose assets have been placed in the hands of a receiver are concerned, it is not a matter that affects the receiver.*" (Italics ours)

Under the Law of Georgia Attorneys' Fees Stipulated for in a Note Are a Part of the Principal Indebtedness, and a Lien Securing the Debt Repesented by the Note Secures also the Attorneys' Fees.

The lien came into existence when the loan deed was made and it secured, as a whole, whatever amount might become due during the existence of the lien under the contract, performance of which it was given to insure. The amount so secured included the stipulated attorneys' fees. This has been conclusively settled by opinions of the Georgia courts, from which we quote:

> "Under the Civil Code (1910), Sect. 4252, an agreement to pay attorneys' fees, in addition to principal and interest, contained in a promissory note can not be enforced unless the holder of the

note shall give to the debtor notice in writing ten days before bringing suit, and unless the debtor shall fail to pay the debt on or before the return day of the court. If the conditions of this statute are complied with, the attorneys' fees included in the contract are treated rather as parts of the principal debt than as a penalty." *Royal v. Edinburg-American Land etc. Co.*, 143 Ga. 347, 350.

"The notes sued upon were unconditional contracts, so far as they stipulated for the payment of principal and interest, and were conditioned so far as the promise to pay attorneys' fees was concerned, the condition being supplied by the statute, which makes the giving of written notice of the intention to bring suit a condition precedent to the recovery of attorneys' fees. * * * When the conditions required by law for the recovery of attorneys' fees have been met the plaintiff is as much entitled to the recovery of attorneys' fees as he is to the recovery of principal and interest." *Valdosta etc. R. R. v. Citizens Bank*, 14 Ga. App. 329.

"It has been ruled by this court repeatedly, that when a note stipulates to pay a given amount as principal and a certain per cent as attorneys' fees, such attorneys' fee is itself a part of the principal." *Peeples v. Strickland*, 101 Ga. 829; *Evans v. Bank*, 147 Ga. 621.

"It is insisted, however, that even if the plaintiff in this case was entitled, as in *Harris v. Powers*, 129 Ga. 86 (58 S. E. 1038, 12 Ann. Cas. 475), and *McCall v. Herring*, 116 Ga. 239 (42 S. E. 468), to a lien upon the land, these decisions did not hold that the security of the debt extended to the attorneys' fees; and it is urged that no Georgia case can be found in which it is held that attorneys' fees are part of the purchase money. A note given for the purchase money of land may include a stipulation for the payment of attorneys' fees

in the event the principal and interest of the note are not paid at maturity, and in the event of such default if the holder of the note complies with the statutory requirements as to the giving of notice ten days before the filing of the suit and by reason of the nonpayment of the note liability for the attorneys' fees results, *the attorneys' fees become part of the indebtedness and the obligation of the deed given to secure the original debt extends to and includes the attorneys' fees as a part of the debt as a whole. Consequently, one who is entitled to a special lien upon described real estate is also entitled to a lien for the amount of attorneys' fees to which the debtor may be legally subject.* It seems to us that the ruling in *McCall v. Henry, supra*, support this principle just announced. But if we should be in error as to this, and even though we be pioneers in adjudicating this point, we think our holding is supported by sound reasoning, and for that reason the holding is unequivocal." *Guarantee Trust & Banking Co. v. American National Bank*, 15 Ga. App. 778. (Italics ours)

From these opinions it appears to be clear that Section 4252 of the Georgia Code respecting stipulations in notes for payment of attorneys' fees (indirectly alluded to in the Circuit Court of Appeals, and quoted in the footnote*) does not render such stipulations void in the sense that they are null and inoperative, but merely converts them from agreements absolute in form to conditional agreements. Such an agreement

*Georgia Code Sect. 4252. "Obligations to pay attorney's fees upon a note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same; provided, the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing ten days before suit is brought of his intention to bring suit, and also the term of the court to which suit will be brought."

is existent from the making of the note, and its performance, upon the occurrence of the conditions imported by the statute, if the note be secured, is secured as fully as is the agreement to pay the loaned principal and interest.

Section 67d of the Bankruptcy Act Preserves the Petitioner's Lien.

The petitioner's lien is preserved by Section 67d of the Bankruptcy Act, which provides as follows:

> "d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act."

In the court below it was claimed, on brief, by counsel for the trustee, that a lien for the attorneys' fees in this case cannot be sustained under Section 67d of the Bankruptcy Act, for the reason that the proceedings in the City Court of Atlanta were not taken in good faith, but "to circumvent the bankruptcy act", and that they "thereby were taken in contemplation of bankruptcy."

It is, of course, not necessary to argue that the requirements of the section relate to the placing and taking of the lien, and not to proceedings looking towards the enforcement of it. The entire propriety of the proceedings by Security Mortgage Company will be discussed later in this brief. The point made here is that they could in no event affect the validity of an existing lien.

It was also urged by counsel for the trustee that the consideration for the attorneys' fees claimed was the services of attorneys for Security Mortgage Company, rendered after the adjudication in bankruptcy, and hence that the lien can not be effective as against the trustee. The answer to this contention is obvious. The consideration for the lien was not the attorneys' services, but the $90,000 advanced by Security Mortgage Company, when the loan deed was given. For this payment Security Mortgage Company received the note and the lien securing it. It can not be held that there was any lack of present consideration. No other or further consideration was ever to be paid for the lien.

It is plain enough not to require to be argued that the consideration paid for a lien can not measure the amount secured by the lien at any given time. In this case the lien created by the loan deed secured payment of principal equal to the full amount paid for the lien, and in addition it secured so much interest as might accumulate, at the rate provided by the terms of the contract, and such attorneys' fees as might also become due thereunder. Obviously the amount which might come to be secured was contingent upon the extent to which interest should be permitted to accumulate, as well as upon whether attorneys' fees should accrue. In other words, it would exceed the amount paid for the lien by some uncertain amount.

Section 63d of the Bankruptcy Act has no Application to Petitioner's Claim.

In the Circuit Court of Appeals counsel for the trustee urged, on brief, that the claim of Security Mortgage Company for a lien for attorneys' fees was barred

by Section 63d of the Bankruptcy Act, because the claim was not absolutely owing at the time of the adjudication of bankruptcy. The court said in its opinion:

> "The attorneys' fees were not a fixed liability at the time of bankruptcy, and became a lien on the property, if at all, merely by virtue of the judgment of the state court. There is no doubt that the property passed into the custody of the District Court sitting in bankruptcy without adjudication and no court had jurisdiction to impress it with a lien not then in existence. *Murphy v. John Hoffman Co.*, 211 U. S. 586; *In re Joseph Webre*, 219 F. 417; *In re Jno. T. Moore Planting Co.*, 237 F. 737." (R. 62)

We submit that the contention of counsel referred to, and the ruling of the court below, misconceived the nature of the petitioner's claim. That claim was not presented for allowance generally against the bankrupt's estate under Section 63d; neither is any contention made that the judgment of the state court "impressed" the property in the Receiver's hands "with a lien not then (at the time of the adjudication of bankruptcy) in existence." There is no question here that the petitioner's lien, under its loan deed, was then in existence. The sole question is whether that lien extended to and covered the item of attorneys' fees.

We maintain that the lien does cover the attorneys' fees because, under the law of Georgia settled by the decisions hereinbefore cited, attorneys' fees, when the conditions of the statute as to notice have been complied with, are a part of the principal indebtedness, and are secured to the same extent as the original debt and the interest thereon. The lien was impressed upon the property by the contract of Hanson Motor Company,

and by the loan deed which it gave. It rests to no extent whatever upon the state court judgment.

While that judgment declared the lien, it did not purport to create it, nor to impress it upon the property. It was a mere liquidation of the amount owed to Security Mortgage Company under its contract, secured by the loan deed. Procurance of judgment is, under the law of Georgia, a necessary preliminary step to the enforcement of a mortgage lien in the state courts, but the court rendering the judgment neither creates the lien, nor determines its existence.

This is made clear by the decision of the court in *Edenfeld v. Bank of Millen*, 7 Ga. App. 645 (67 S. E. 896). That was a case where suit was brought in a city court on notes secured by a loan deed. The opinion of the court was in part as follows:

> "The reduction to judgment of a debt secured by a deed, under the provisions of section 5432 of the Civil Code, does not bring up the question of title. If the defendant in *fi. fa.* did not have title at the time he conveyed the property to the creditor, and for that reason the creditor's attempt to put title into him for the purpose of levy and sale was ineffectual, that question would be raised subsequently to the levy. The allegation that the debt was secured by a deed, and the statement that one of the purposes of the suit was to get a special lien, is clearly surplusage, because in any contest over these questions the plaintiff in *fi. fa.* could show *aliunde* that the lien of his judgment was superior to that of others by reason of the fact that his debt had been secured by deed. The city court of Millen had full jurisdiction to reduce to judgment the debt in favor of the plaintiff, and the allegations in favor of the plaintiff, *and the allegations in regard to the nature of the*

> *plaintiff's security, being entirely unnecessary, could be disregarded as surplusage.* Section 5432 of the Civil Code confers a right which, it is plain, from the language employed in Section 1970 of the Code of 1882, is not required to be enforced in the superior court solely. The language used in section 1970 of the Code of 1882 is, 'When any judgment shall be rendered in any of the courts of this state', etc. *A suit to reduce to judgment in any court in this state a debt which is within its jurisdiction, although the debt may be secured by a deed to realty, is not a suit respecting title to land, nor does it affect the title.* Any effect upon a title must develop subsequently to the rendition of the judgment, and is *dependent upon whether there is or is not real estate security.*" (Italics ours)

The state court action was in no sense a proceeding against property in the hands of the bankruptcy court. Because it was recognized that, the property being in that court, the lien must be there asserted against it, Security Mortgage Company made no attempt to levy upon the execution representing the state court judgment, but presented its liens in the bankruptcy court, asking only for an order "declaring petitioner's liens to be prior liens upon the land or any funds derived *from the sale of said lands* in said court." (R. 33) The Referee allowed the claims so presented only *against the fund* and not generally against the bankrupt's estate, in language as follows:

> "This claim is allowed *and ordered paid out of the proceeds from the sale of real estate* and the objections of the trustees are overruled on each and every ground." (R. 37) (Italics ours)

Because the action in the state court was not against the trustee and not against the property of the bankrupt in the hands of the trustee or the Receiver, we submit that the cases cited in the opinion of the Circuit Court of Appeals are not relevant.

In *Murphy v. John Hoffman Co.*, 211 U. S. 586, the question involved was whether title to property in the hands of a trustee in bankruptcy could be settled in a replevin action brought against him personally in the state court.

In re Joseph Webre, 219 F. 417, was a case where a foreclosure suit in a state court was begun after the institution of bankruptcy proceedings, but before adjudication, "the sole purpose of which was *the enforcement of the mortgage lien*, no personal judgment against the mortgage being sought." That clearly was an action against the property; and it was held that the plaintiff in the state court action might be enjoined from proceeding with it, the court saying:

> "The filing of the petition, of course, does not displace or disturb such liens; but neither the existence of such liens nor *attempts of the lienor to enforce them without resorting to the court of bankruptcy for that purpose* constitute obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it. The court is vested with ample power to protect the rights of lien holders otherwise than by permitting them to be enforced in some other court or courts." (Italics ours)

In Re Jno. T. Moore Planting Co., 237 F. 737, also cited by the Circuit Court of Appeals, a judgment had been obtained in the state court, which directed that the property in question should be seized and sold to

satisfy a mortgage debt. There was a substantial equity above such debt. The property had not been taken possession of by the state court, but was in the hands of the bankruptcy court. The question was whether that court should administer the property, or should surrender it, to be levied upon under the state court process. Holding that it should not be surrendered, the court, on page 742, said:

> "The action pending in the state court between the Levert Company and the Moore Planting Company, at the time the latter filed its petition in bankruptcy, was a personal action, although mortgage rights were invoked. See article 12, La. Code of Prac.; Rogers v. Binyon, 124 La. 95, 49 South. 991; also, Ker v. Evershed, 41 La. Ann. 15, 6 South. 566. Such action could only have a semblance of a real action after an issuance of a writ of *fieri facias and the seizure of the property on which the lien was claimed*, and no writ of *fieri facias* had been issued, and of course no seizure thereunder." (Italics ours)

If a lien has been taken in good faith, for a present consideration, and has been recorded, if record is required by local law, thus conforming to the requirements of Section 67d of the Bankruptcy Act, it is unaffected by bankruptcy, although it may secure performance of a contingent liability not provable in bankruptcy under Section 63d. For example, an agreement to pay a stated sum annually, to a divorced wife so long as she shall remain unmarried, is a contingent liability not provable in bankruptcy. *Dunbar v. Dunbar*, 190 U. S. 340. But it would not be contended that if performance of such a contract has been secured by a mortgage of real estate, a trustee in bankruptcy may

sell the property free from liens, and distribute the proceeds without regard to the lien.

Recognition of the Petitioner's Claim is in no Way Inconsistent with Either the Letter or the Spirit of the Bankruptcy Act.

Recognition of the petitioner's lien violates in no way either the letter or the spirit of the bankruptcy law. It is the policy of that law, expressed in Section 67d, heretofore quoted, to leave wholly unaffected liens which, for a present consideration and in good faith, in a manner recognized by local law parties have taken in their dealings with one who has thereafter become bankrupt.

If liens taken in good faith, and in accordance with the laws under which business is done, in the respective states, were to be destroyed, upon the occurrence of bankruptcy, obviously credit could not exist. Hence Congress expressly disclaimed intent to affect such liens.

In this case Hanson Motor Company desired to borrow money. Security Mortgage Company was willing to lend, but desired to secure repayment of the loan, with interest, and without cost for collection. The law of Georgia enabled the giving of a lien on real estate to secure payment of these several items, subject only to the condition that the lien, so far as attorneys' fees were concerned, should be enforceable only if, after default, Security Mortgage Company (or the holder of the obligation received by it) should give to Hanson Motor Company a notice of its intention to begin suit against it and claim in such suit the fees stipulated for, thereafter beginning and entering such suit according

to such notice. Upon the assurance afforded by such a lien, Security Mortgage Company made the desired loan.

What Security Mortgage Company did when default in payment occurred is not open to proper criticism. It acted not only within its legal rights, but in the only way in which its legal rights could be preserved. It asks now nothing except payment of what was secured to it, when it made its loan, by an agreement of which all the world had notice.

The situation which faced Security Mortgage Company was this: Its debtor had transferred the mortgaged property to Florida Furniture Corporation, which had agreed with the debtor to pay the debt (R. 43),—to which agreement, however, Security Mortgage Company was not a party. Florida Furniture Corporation had become bankrupt. Interest overdue was not paid. The property upon which Security Mortgage Company had a lien to secure payment had been taken possession of by a receiver in bankruptcy. The trustee was asking for authority to sell the property "either free from liens or subject to the lien of Security Mortgage Company." (R. 10, 14) Security Mortgage Company had been served with notice of his petition. (R. 15-16)

In this situation Security Mortgage Company required the services of attorneys to obtain payment. No sane man, in a similar situation, would let his note for $80,000 go unattended, or attempt to act respecting it without legal aid. The contingency which Security Mortgage Company had foreseen as possible, when it made its loan, and had then secured itself against, had arisen. It turned the note over to its attorneys for collection through them.

Against loss from the expense it was thus compelled to incur Security Mortgage Company was entitled to the protection which it had insisted should be given to it. There was, however, a condition of its contract with its debtor, Hanson Motor Company, which rested upon it to perform, in order to keep its security good, and the obligation of such debtor binding, so far as attorney's fees were concerned.

This condition was supplied by the statute of Georgia, hereinbefore set out, which required Security Mortgage Company to give notice of its intent to bring suit, and to claim the stipulated attorneys' fees; and to enter suit according to the notice given,—thus giving to its debtor, under the statute, the time allowed for it to make payment of its debt. *Harris v. Powers*, 129 Ga. 75.

Had Security Mortgage Company failed to perform this condition it would, by such failure, have disabled itself to recover as against its debtor the attorneys' fees stipulated for; and, of course, it could have held the real estate, covered by its loan deed, only to the extent necessary to secure payment of what the debtor owed to it upon the contract secured by that deed.

When, therefore, Security Mortgage Company gave notice to its debtor, and brought suit against it in accordance with the notice, it did only what was requisite to keep good and enforceable the contract its debtor had made. By thus keeping its rights good it neither sought to "circumvent the Bankruptcy Act" nor to take anything from anybody not rightfully belonging to it. Had the property remained in the hands of its debtor nobody could question its rights to attorneys' fees. If the property had passed into the hands of a receiver, or other third party, the same would be true.

John Hancock Life Insurance Co. v. Ross, Receiver, 162 Ga. 654. How, then, can the situation be different where it is the trustee of a bankrupt's estate who has, through the bankrupt, so far as the real estate here in question is concerned, stepped into the shoes of the debtor?

It can not be questioned that Security Mortgage Company, so far as Hanson Motor Company is concerned, had the right to proceed by suit, as it did. This was conceded by counsel for the trustee, in the Circuit Court of Appeals. Undeniably, then, the judgment settles the extent of the indebtedness of Hanson Motor Company to Security Mortgage Company, under the contract secured by the loan deed.

No injustice to the creditors in bankruptcy is involved. Florida Furniture Corporation took the property subject to the lien securing payment of whatever Hanson Motor Company might at any time owe under its contract. Upon bankruptcy this property passed to the bankrupt trustee so burdened.

The trustee knew for what the property was held. He could have prevented default by payment of the interest. And, after default, he could have prevented the maturing of attorneys' fees by payment of the amount due at any time before suit was entered.

There would be no equity in permitting a trustee to neglect meeting obligations which, but for bankruptcy, the bankrupt must have met, by such neglect imposing upon a secured note holder the necessity of employing counsel, without subjecting the trustee to whatever increase in the burden upon the property securing the note naturally arises, under the terms of the instrument of security, from the action made necessary by the trustee's failure to meet those obligations.

The justice of recognizing and giving effect to secured agreements for the payment of attorneys' fees, which a creditor finds it necessary to incur, to protect his investment, was very clearly set forth *In Re Fereri*, 188 F. 675, 676. That case involved a lien similar to the lien in this case, valid under the local law of Louisiana. The mortgaged property had been sold, in the bankruptcy court, free from liens. The referee ruled that the creditor's attorneys' fees for representing the creditor in the bankruptcy court could not be paid from the proceeds of the sale. Overruling the referee, the court said:

> "In the case of *Mullan v. His Creditors*, 39 La. Ann. 397, 2 South. 45, however, which was decided in the instance court by his honor, Mr. Justice Monroe and affirmed by the Supreme Court, the court said:
>
> 'The claim of the mortgage creditor for attorneys' fees incurred by him, after the maturity of the note and for services rendered to secure payment of his note, is well founded.
>
> 'It was agreed by the act of mortgage that the mortgagor bound himself and his assigns to pay the holder of the note all attorneys' fees, as he may incur, in the event of the nonpayment of the notes at maturity.
>
> 'The evidence shows that, after the sale of the mortgaged real estate, the syndic ruled the mortgagee to show cause why the inscription of his act of mortgage should not be cancelled to give a title to the purchaser.
>
> 'The mortgagee was thus constrained to employ counsel to represent him and see that, if the amount went to the syndic, it would be secure in his hands. This was not a mere formality. Responsibility rested on the counsel, for

> which the mortgagee, under the clause, is entitled to recover the compensation, as fixed in the contract.'
>
> "I do not find that this decision has ever been questioned or overruled in the slightest degree, and it applies with the same force to proceedings in bankruptcy as it did to proceedings under the insolvent laws, as no valid title to mortgaged property can be delivered by the trustee without bringing the mortgagee into court in practically the same manner."

This case illustrates the error of the Circuit Court of Appeals in saying that the lien of Security Mortgage Company for attorneys' fees "became a lien on the property, if at all, merely by virtue of the judgment of the state court."

In the *Ferreri* case there was no state court judgment, nor state court suit. Attorneys' fees were held a lien because the contract, secured by the mortgage, stipulated for their payment, and because the state law recognized the mortgage lien as covering such fees.

In this case, Security Mortgage Company's lien for attorneys' fees depends, not upon the state court judgment, but on the agreement to pay contained in the note, and secured by the loan deed.

If appearance had been made for Hanson Motor Company, in the state court suit, and judgment had been thereby delayed, and had not yet been entered, but the facts otherwise were as appears from this record, Security Mortgage Company would have the right to prove its lien for principal and interest and attorneys' fees, as stipulated, against the fund here involved. The condition, as to giving notice, etc., which the Georgia statute imports into the stipulation,

having been performed, the debtor was under obligation to pay according to the stipulation, and the real estate was held to secure performance of the debtor's obligation, without regard to whether a judgment had or not been entered in the suit against the debtor.

The completion of the suit by entry of judgment put into liquidated form Hanson Motor Company's indebtedness; but it neither increased nor diminished any payment which the trustee must make to free the property from the lien of Security Mortgage Company. The declaration, made by the judgment, that the indebtedness found by the court was a special lien was not necessary to its recognition in a court of bankruptcy, *but only the right, under the law of the state, to have it so declared.*

The property under lien having been taken possession of by the bankruptcy court, and sold under an order reserving the right of Security Mortgage Company to have its lien paid from the proceeds, proof of the extent of the indebtedness which the lien secured became necessary. Such indebtedness then having been liquidated by judgment, the judgment was shown, but the declaration of the state court that the lien existed was not depended upon to establish that fact. Proof was offered of the making of the loan deed, of the occurrence of the default, and of compliance with the provisions of the statutes of Georgia with reference to the collection of attorneys' fees in contracts providing therefor. (R. 31, 32)

This lien, recognized by the law of Georgia, Section 67d of the Bankruptcy Act leaves unaffected; and Security Mortgage Company is entitled to payment of the full amount secured by it exactly as if no bankruptcy of a party interested in the property under the

lien had occurred. So far as the bankruptcy proceedings are concerned, the declaration in the judgment that the indebtedness represented by it is a special lien on such property is mere surplusage. The bankruptcy court was not bound by such declaration; but it was bound by the facts and the law, under which the lien existed.

Under the state law, and in the state courts the declaration in the judgment appears to have no greater effect. After judgment has been obtained, when the lien comes to be asserted, its existence is an open question unaffected by the declaration in the judgment. *Edenfeld v. Bank of Milieu*, 7 Ga. App. 645. The trustee has a similar right in the bankruptcy court to deny the existence of the lien, sought to be asserted, notwithstanding the declaration in the judgment, and the question of the existence of the lien is determinable in that court upon the facts shown in the record and under the applicable local law. Hence recognition of the lien claimed to the full extent recognized by such law in no way conflicts with the spirit of the bankruptcy act.

The legality of proceedings intended to keep good a stipulation for attorneys' fees, notwithstanding the insolvency of the debtor, has been settled by the Supreme Court of Georgia. In *Harris v. Powers*, 129 Ga. 75, 58 Southeastern 1038, one holding a note containing such a stipulation, given by one who had died insolvent, gave to the administrator of an insolvent estate notice of intent to sue and claim attorneys' fees, at a specified term of court. He then, on the return day of that term, joined with other creditors in an equitable petition, under which the estate was placed in the hands of a receiver to administer under decree of the court. An auditor was appointed to report on claims

presented in the proceeding. Upon the claim of said note holder, the auditor ruled that it was not equitable to allow attorneys' fees in the circumstances, and that it "was not the purpose of the law makers to have the act of 1900 (Code Section 4252 concerning attorneys' fees) bear such a construction as to impose upon an insolvent estate a large sum for attorneys' fees." The Supreme Court of Georgia held that the attorneys' fees should be paid, saying:

> "The law does not prohibit the rendering of a judgment for attorneys' fees because the debtor estate is insolvent. Such a condition may make it more difficult, and sometimes impossible, for a creditor to realize on his judgment; but he is not debarred from the privilege of obtaining it."

The Judgment of the Circuit Court of Appeals is in Conflict with Applicable Local Decisions.

The decisions which have been hereinbefore cited appear clearly to establish the fact that under the law of Georgia the holder of a secured note, containing stipulation for the payment of attorneys' fees, has the right to the benefit of his security, to insure payment of such fees, notwithstanding conveyance of the property, of which he holds the legal title as such security, to one who becomes insolvent or bankrupt. The decision of the Circuit Court of Appeals in this case conflicts with such applicable local decisions. It is not necessary to argue that the question of local law involved is important, affecting, as it does, contracts which play such a large part in the commercial transactions of the people of every state.

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The Judgment of the Circuit Court of Appeals is in Conflict with the Decisions of Other Federal Courts.

The ruling below also conflicts with the decisions of other federal courts, where attorneys' fees for services rendered after bankruptcy, but secured by liens valid under local laws, have been recognized. *In Re Wendell*, 152 F. 672 (E. Dist. Pa.); *In Re Torchia*, 185 F. 576 (W. Dist. Pa.); *In Re Peerless Weaving & Throwing Co.*, 259 F. 610 (M. Dist. Pa.); *In Re Ferro*, 188 F. 675, (E. Dist. La.); *In Re Ellis*, 296 F. 241 (W. Dist. Pa.)

In its opinion the Circuit Court of Appeals cited three decisions of its own as a precedent for the decision made in this case. It might well be expected that other decisions involving the same error would be found in the Fifth Circuit, but the particular cases cited by the court appear to be dissimilar to this case. We mention them briefly.

In Re Roche, 101 F. 956, is the first of those cases. There the note provided for payment of attorneys' fees "should it become necessary to foreclose" before foreclosure bankruptcy occurred, and the trustee sold the property. The mortgagee presented his claim for debt and attorneys' fees, asserting that the proceeding in the bankruptcy court was the equivalent of foreclosure. The claim, as to attorney's fees, was denied, upon the ground that it was not the intent of the statute that bankruptcy proceedings should be considered the equivalent of foreclosure. It was clearly recognized that the bankruptcy court should hold valid the security to the full extent created by the contract. We quote from the opinion:

"The contract being valid according to the laws of Texas, it only remains for us to decide how it shall be construed. * * * In construing the contract, the intention of the parties must prevail, and this intention should be derived from the language employed. The contract must stand as the parties made it. A new contract cannot be made for them by the court. * * *

"The fees, to become a charge against the debtor or his property, must mature according to the contract of the parties. It follows that if the attorney's fees in this case became payable only upon the foreclosure of the trust deed by suit in the usual form, as by bill in equity, or, according to the practice in Texas, by petition praying for a foreclosure, with all parties claiming adversely before the court, they would not be collectible in a proceeding where the trustee in bankruptcy had sold the property and distributed the proceeds, although the same end might have been attained in securing the payment of the debt of the mortgagee."

The next case cited was *Labarre v. Citizens Bank*, 193 F. 648. In that case fees were disallowed, not because the stipulation for fees was unenforceable, but because, under the stipulation, they had not become due. The decision went expressly on that ground, the court saying:

"Labarre, the plaintiff in error, was an endorser of the note, and was not a party to the mortgage. The right to collect attorneys' fees does not appear to exist inasmuch as the foreclosure of the mortgage 'for want of payment' has not yet been resorted to."

In *British & American Mortgage Company v. Stuart*, 210 F. 425, the last of said three cases, the claim, as the

court held upon consideration of the pleadings, was presented not against the fund resulting from sale of the mortgaged property alone, but for allowance to be paid from the estate, on a parity with unsecured claims, to the extent that the security might be insufficient. For this reason it was held that Section 63a prevented the allowance of attorneys' fees for services after bankruptcy.

Certain other federal court decisions were also cited below, on brief, by counsel for the trustee, as supporting their contention that the petitioner's lien for attorneys' fees should not be recognized. We do not deem it necessary to discuss those cases. Some of them involved claims for attorneys' fees on unsecured notes. Some of them arose from states where the local law is different from the law of Georgia; and some were not analogous to this case. If it be conceded that some cases from District Courts in the Fifth Circuit, and possibly some other of the cited cases, appear not in conflict with the decision which has been made below in this case, this diversity of rulings but emphasizes the necessity for the issuance of the writ sought in this case, to the end that the correct rule may be declared by this court.

Respectfully submitted,

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FILED
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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1927.

NO. [redacted] 32

SECURITY MORTGAGE COMPANY,
Petitioner.

versus

CHARLES A POWERS, Trustee in Bankruptcy for FLORIDA FURNITURE CORPORATION, Bankrupt,
Respondent.

DILLON, CALHOUN & DILLON,
Attorneys for Respondent.
WALTER S. DILLON, of Counsel.
Atlanta, Georgia.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

It will be noted that the petition for certiorari is based upon the contention that the decision complained of is in conflict with decisions of the Supreme Court of the State of Georgia, upon the same question, and that the Circuit Court of Appeals, in rendering the decision, was in error in deciding that the State court decisions were not applicable.

This court should, therefore, at the outset, determine the nature of the issues involved. We think that counsel have misconceived the case, in that the validity of the judgment of the City Court of Atlanta fixing the lien for attorneys,

when asserted in the bankruptcy court, depends upon bankruptcy law and not on the decisions of the Supreme Court of Georgia.

There are two (2) issues, both of which are based upon federal law, and to decide these there is no occasion to consider the state law.

These two questions, or issues, are as follows:

1. Did the City Court of Atlanta have jurisdiction to fix a lien against real estate then in the custody of the trustee in bankruptcy? (It must be conceded, that without this judgment, there can be no basis for the lien claimed.)

2. Was the debt for attorneys' fees due and absolutely owing at the time of bankruptcy, as required by Section 63A of the Bankruptcy Act?

It will be readily seen that both of these questions will be solved by reference to federal law and not to state law.

THE BANKRUPTCY COURT HAD EXCLUSIVE JURISDICTION.

The actual possession by the bankruptcy court of the property involved effectually displaced the power of other courts to deal with it.

Murphy v. John Hoffman Company, 211 U. S. 586; 53 L. Ed. 330; 29 Sup. Ct. 154; 21 A. B. R. 487.

In re: O. L. Stamps, 300 Fed. 162, 3 A. B. R. (N. S.) 583.

Matthews & Sons v. Webre Co., 213 F. 396.

In Re: Buxton, 236 F. 407.

In Re: Joseph Webre, Pugh, v. Loisel, 219 F. 417.

Re: Hotel Equipment Company, 297 F. 842; 3 A. B. R. (N. S.) 21.

Palmer v. Texas, 212 U. S. 131, 53 L. Ed. 440.

In Re Schermerhorn, 145 F. 341.

Jurisdiction of Bankruptcy Court is essentially exclusive.

Re: Watts, 190 U. S. 30; 47 L. Ed. 933.

Central National Bank v. Stevens, 169 U. S. 459; 42 L. Ed. 817.

Annotation, Note 8, United States Code Annotated, Title 11, pp. 53-55, same pp. 74-76.

Collier on Bankruptcy, Volume 1, page 43.

5 Remington on Bankruptcy, pages 430, 444, 445, 449.

Wabash Railroad v. Adelbert College, 208 U. S. 54-8, 52 L. Ed. 386.

Central Bank of Ga. v. Gibson, 11 Ga. 453.

Ponce v. Underwood, 55 Ga. 602 (2).

Guarantee Trust, etc., v. Green Code Springs, etc., 139 U. S. 137 (5); 35 L. Ed. 116 (5).

15 C. J. 853.

In Re: Gimbel, 294 Fed. 883 (1).

THE DEBT FOR WHICH LIEN IS CLAIMED MUST BE ABSOLUTELY OWING AT THE TIME OF BANKRUPTCY, SECTION 63A, BANKRUPTCY ACT.

British & American Mortgage Co. v. Stuart, 210 Fed. 425; 5th Cir. C. C. A.

First Savings Bank & Trust Co. v. Stuppi, 2 Fed. (2nd) 822 (4).

McCabe v. Patton, 174 Fed. 217.

Hoffecker v. Smith, 294 Fed. 883 (3) 5th Cir.

Zavelo v. Reeves, 227 U. S. 628; 57 L. Ed. 678-9.

In Re: Garlington, 115 F. 999—D. C. Tex.

In Re: Thompson, 144 F. 314, D. C. Tex.

In Re: Keeton, etc., 126 F. 426-429, D. C. Tex.

In Re: Muscott Steel Products Co., 294 Fed.84.

In Re: Gebbard, 140 F. 571, D. C. Pa.

Remington, Sections 809 and 2613.

2 Collier, page 1394.

In Re: Mobile Chair Mfg. Co., 245 Fed. 213.

It will be noted that while the petition for certiorari in this case is based on conflict alleged to exist between the decision sought to be reviewed and the state court decisions, yet in petitioner's brief it is contended that there is a conflict also with other federal court decisions. We submit that the decision of the Circuit Court of Appeals, and the cases cited in this brief, are not in conflict with other decisions cited by petitioner, and that the decision of the Circuit Court of Appeals is in harmony with decisions generally by other courts on the same question, and that there is no occasion to require this court to render a decision in order to settle a conflict. This court has already passed on both questions. The state of the law is most harmonious and satisfactory,—not to be improved upon by additional judicial findings.

The specific decisions mentioned by counsel in their brief, as being in conflict with the decisions relied upon by respondent, are given on page No. 38 of brief of petitioner.

The court will observe that these are all opinions of district courts in the State of Pennsylvania, except one in Louisiana. We have examined these and find that while attorneys' fees were allowed, the opinions were not based upon the jurisdiction of another court to fix the fees, nor on the fact that the debt was not due and owing, so that there is no ruling in these decisions in conflict with the decisions cited. And, we think that no court could very easily render a decision finding that attorneys' fees earned after bankruptcy was a debt absolutely due and owing at the time of bankruptcy, nor is there a decision to be found which would permit a state court to oust the jurisdiction of the bankruptcy court, once the administration had taken place and the property involved had come under its jurisdiction.

Respectfully submitted,

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Supreme Court of the United States

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Petitioner,

vs.

[redacted]
Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

Term No. 662, October Term, 1927.

SECURITY MORTGAGE COMPANY, PETITIONER,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT, RESPONDENT.

STATEMENT

The Security Mortgage Company, petitioner herein, holds a note providing for payment of principal, interest, and attorney's fees. The note was secured by a deed to property which came into custody of the bankruptcy court. Hanson Motor Company, maker of the note, had transferred the property to the bankrupt which assumed the indebtedness.

At the time of bankruptcy, the note was not in default. A trustee had been elected who was in actual custody of the property and was preparing to sell this real estate before the interest installment became due.

In the proceedings brought by the trustee to sell, he made the Security Mortgage Company a party by rule, and it appeared in the bankruptcy court in response to the proceedings to sell, and made no objection to this action of the trustee, later having filed a petition to confirm the sale. The trustee had recognized the validity of the security deed to the extent of principal, interest and taxes, and the purpose of the trustee was to make the property bring some amount over and above these liens, to be used for the benefit of unsecured creditors.

At this time the attorney's fees provided in the note, under the statute of Georgia, was not due, such provision as to at-

torney's fees being void, unless and until notice had been given and suit instituted in pursuance thereto, and such attorney's fees could not be claimed directly in the bankruptcy proceedings.

After the bankruptcy court had thus taken jurisdiction of the res involved, had proceed to an orderly administration by making the Security Mortgage Company a party, and recognizing the invalidity of the provision for attorney's fees under its contract, the Security Mortgage Company sued the maker of the note, Hanson Motor Company, in a state court, complying with the statute as to notice to the maker, and secured a judgment for principal, interest and attorney's fees, against the Hanson Motor Company, who had executed the loan deed.

The Security Mortgage Company went into the state court for this purpose at a time when the trustee was doing all possible in a legal way to have the property sold and the debt paid, so that there was no necessity for such legal action, and it did not improve the lien rights of the Security Mortgage Company as against the property, nor tend to hasten the collection of principal and interest, and no attempt was made to disturb the custody of the trustee, no notice having been given of the state court proceedings.

The question then before this court of determination is whether attorney's fees provided in a note which have been matured by judgment in the state court, after bankruptcy, can be asserted against the property in the actual custody of the trustee under all the facts and circumstances as set forth above.

The case was tried in the courts below soley on the theory that the judgment of the City Court of Atlanta adjudicated the right to attorney's fees, and thereby a right not had directly in the banqruptcy court on the note itself was created, upon which the claim was predicated in the bankruptcy court, and when the claim to the fund was finally made it was under the judgment (R pp 24 and 26).

ARGUMENT

We assume that the position of counsel for the Security Mortgage Company is that to disallow the claim for attorney's fees would in effect deprive claimant of its rights under the contract, for counsel say in their brief (page 25) "It (the lien) rests to no extent whatever upon the state court judgment." So that whatever right is claimed, must proceed from the contract and not from the judgment, although it will be conceded that no claim could have been set up on the contract without the aid of the judgment in the bankruptcy court, and, in fact, no such claim was made. See Stone vs. Marshall and Company 137 Ga. 544.

We do not believe the case can be now tried, on any such theory, it being too late to shift, and that the question must be decided on the validity of the judgment in the state court.

And counsel's position that the debt for attorney's fees existed on the date when the note was made is erroneous, since it is a fact that attorney's fees could not exist under the contract till notice had been given followed by judgment.

The contentions of the trustee are as follows:

RIGHTS UNDER CONTRACTS ARE FIXED AS OF THE DATE OF BANKRUPTCY.

The trustee says that he represents all the creditors of the estate of the bankrupt, secured and unsecured, and that the rights of all parties must necessarily be fixed as of some specific date, and that the date of adjudication and custody of the res, is this date. Whatever conditions exist as of that date, determine the rights of creditors. "As has been stated, the condition at the time of filing of the petition measures the extent of the estate, and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law." 1 Collier on Bankruptcy, 13th Ed., p. 658. Bankruptcy "stays the hands of creditors." After bankruptcy, claims cannot be increased or rights changed

except by proceedings in the bankruptcy court. That court has exclusive jurisdiction and will look to see what claims existed on the date of bankruptcy.

But it will be contended that the enforcement of this rule, will deprive the Security Mortgage Company of its contractural rights. To this we say, that its right, namely, to have its debt paid, principal and interest, were being looked after by the bankruptcy court when the judgment increasing the debt was taken. And that the bankruptcy law existed when the Security Mortgage Company entered into its contract. The bankruptcy law is a paramount law, a law which, when jurisdiction ensues, displaces all other power to deal with the estate, and the Security Mortgage Company had notice of this law when it entered into its contract, so that his claimant can have now no complaint, if its contract is recognized as it existed on the date of bankruptcy.

The bankruptcy rule is analagous to the equity rule that prevails in Georgia, where notes are presented for payment in an equity case. Stone vs. Marshall supra.

It would be impossible to properly conduct the administration of an estate, and do justice between all creditors, the secured and unsecured, without having a date when the rights of creditors become fixed.

If such be the bankruptcy law, then a secured creditor ought not to be permitted to do indirectly what it could not do directly. If the Security Mortgage Company had no claim for attorney's fees under its contract as of the date of bankruptcy, and after it had become a party to the proceedings, then it ought not to thereafter be allowed to create a claim by indirect proceedings. This would do violence to the principle expressed in a number of cases decided by this court. On the point discussed, we quote the following:

Bailey vs. Baker Ice Mach. Co., 239 U. S. 275.

"When not otherwise specially provided, the

rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court."

Lazarus, Michel & Lazarus vs. Prentice, 234 U. S. 265. "The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the fulll right to administer the estate under the bankruptcy law."

"Such assignment was a mere nullity, properly disregarded by the bankruptcy court, and notwithstanding which it could direct the delivery of the bankrupts' property to the receiver by summary order. Whatever rights they had are asserted to arise by virtue of the assignments made April 1st, 1913, and after the filing of the original petition in bankruptcy."

Whitney vs. Wenman, 198 U. S. 552.

JURISDICTION IN REM.

The Security Mortgage Company possibly seeks to improve its position by saying that the action in the state court was merely under its contract and against the Hanson Motor Company, who was not a party to the bankruptcy proceeding, and, that the authority of the bankruptcy court to adjudicate its right to attorney's fees, did not exist because it could not act *in personam* as against Hanson Motor Company. This posi-

tion is not tenable, for the reason that the bankruptcy court acts in rem; persons are not so much involved as property. The whole proceeding revolves around an estate, property, assets, the res. It is this rem jurisdiction that is effective in this case as regards rights held against the Hanson Motor Company over whom the bankruptcy court did not have jurisdiction *in personam*. In this case, the res came into custody of a trustee, before the state court acted. So that superior jurisdiction was acquired, even though the Hanson Motor Company, the maker of the note, was not a party to the bankruptcy proceeding. Regardless of individuals, the bankruptcy proceedings are so far in rem that the estate is withdrawn from all outside influences, and the bankruptcy court takes upon itself the exclusive jurisdiction and right to adjudicate all questions respecting the estate as such rights existed on the date of bankruptcy.

The fact that under its contract the Security Mortgage Company had a right to sue its claim to a judgment, including attorney's fees, as against the Hanson Motor Company, is of no avail as against the res in the hands of the bankruptcy court. For bankruptcy acts in rem as well as personam. If it acted only in personam, then the situation would be different, for the judgment as against the Hanson Motor Company was good and in conformity with its contract. When the res passed out of the Hanson Motor Company and into the Florida Furniture Company, and bankruptcy followed before suit in the state court, rights became fixed under the bankruptcy law, which prevented the state court judgment for attorney's fees becoming effective as against the property in the hands of the trustee.

On this question of jurisdiction being in rem, this court, in Robertson v. Howard, 229 U. S. 258, decided the lower court was wrong in assuming the jurisdiction of the bankruptcy court was *in personam*. We quote:

"The court while conceding that the adjudication in bankruptcy 'conveyed this land and all the property of Hagener to the trustee', yet decided that 'the court had no jurisdiction over the land. Its jurisdiction was in personam'."

Lazarus v. Prentice, 234 U. S. 263 supra.

Acme Harvester Company v. Beekman Lumber Co., 222 U. S. 305. "It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."

In addition to the jurisdiction existing in rem, the bankruptcy court had by the service of the rule, jurisdiction in personam of the Security Mortgage Company, the only person whose rights were affected, and this was sufficient to make void the action in the state court.

JURISDICTION IN PERSONAM

The service of the rule on the Security Mortgage Company and its appearance in court pursuant thereto, gave the bankruptcy court jurisdiction over the parties at interest. A forum was thereupon established for the determination of all the rights possessed by the Security Mortgage Company under its contract, and it was not necessary to make the Hanson Motor Company a party.

When jurisdiction attached, whether in personam or in rem, it excluded the right of the state court to act.

Hines & Hobbs v. Rawson, 40 Ga. 360. "Now, in all such cases, as well by repeated decisions as by the necessities of the case, the Court first acquiring the jurisdiction in fact has it to the exclusion of the other: 9 Wheat., 532; 20 How., 583; 10 How., 56; 14 How., 368; 23 How., 90. Interminable confusion would result from any other rule, while harmony and justice flow naturally from the rule as established."

Ex parte Chetwood, 165 U. S. 460. "The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court of concurrent jurisdiction. Moran v. Sturges, 154 U. S. 256 (38: 981), and cases cited. And by U. S. Rev. Stat. 720, the granting of injunctions to stay proceedings in any court of a state is prohibited in express terms."

We ask this court to apply this law to the situation which existed in the bankruptcy court when Security Mortgage Company went into the state court without notice to the bankruptcy court.

Suppose a state court of equity in Georgia had secured jurisdiction in the same way over the parties as the bankruptcy court had, what would have been the results? The following Georgia cases will answer:

Turner v. Peacock, 153 Ga. 879 (5).

Davenport v. Richards, 138 Ga. 611-612.

The Turner vs. Peacock case indicates, that where a state court of equity had taken jurisdiction of the parties with respect to a contract in which attorney's fees are provided to be paid, and before a statutory notice claiming such fees had been given, it would then be too late to comply with the statute in order to mature the claim for attorney's fees, and the party

who held such contract would not be permitted to be excused long enough in which to go out to another court, perfect his attorney's fees and then return and assert the claim in the district court.

BANKRUPTCY COURT HAD EXCLUSIVE JURISDICTION.

Not only was there jurisdiction by virtue of the custody of the res, but this jurisdiction is exclusive.

The opinion in Murphy vs. John Hoffman Company, 211 U. S. 586; 53 L. Ed. 330; 29 Sup. Ct. 154, H. A. B. R. 487, decisive: "It is immaterial that instead of seeking to prove a secured claim in the bankruptcy court, the lienor sought to proceed in the state court. The actual possession by the bankruptcy court of the property involved effectually displaces the power of all other courts to deal with it."

In dealing with the allowance of attorney's fees in a case similar to the one at bar, the Hoffman decision is cited by Sibley, D. J. (Ga): In matter of Stamps, 300 Fed. 162, 3 A. B. R. (N. S.) 583, where he says: "No other court, so long as the bankruptcy court retained its custody and control of the property, had jurisdiction or authority to deal with it or enforce any lien against it, without the express authority of the bankruptcy court."

Other authorities bearing directly on this question are the following:

Matthews & Sons vs. Webre Co., 213 F. 396.

In Re: Buxton 236 F. 407.

In Re: Joseph Webre, Pugh vs. Loisel, 219 F. 417.

In Re: Hotel Equipment Company, 297 F. 842; 3 A. B. R. (N. S.) 21.

Palmer vs. Texas, 212 U. S. 131, 53 L. Ed. 440.

In Re: Schermerhorn, 145 F. 341.

Jurisdiction of bankruptcy court is essentially exclusive—and most comprehensive: Re: Watts, 190 U. S. 30; 47 L. Ed. 933.

Central National Bank vs. Stevens, 169 U. S. 459; 42 L. Ed. 817.

> Wabash Railroad vs. Adelbert College, 208 U. S. 54—8, 52 L. Ed. 386. "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

SECTION 63a1 BANKRUPTCY ACT.

Akin to the established rule that the rights of all creditors must be considered as such rights existed at the date of bankruptcy, is the positive and mandatory provision of the bankruptcy act as expressed in Section 63a. It is in the bankruptcy court that the claim herein for attorney's fees is asserted, and it is concededly a claim which did not exist on the date of bankruptcy. If it be conceded that the state court had the right to enter a judgment establishing a claim against the estate then in the hands of the trustee, yet, since this claim for attorney's fees was not a fixed liability, absolutely owing at the time of filing the petition, it would not be such a debt as can now be recognized.

Counsel's position, while not clearly stated, seems to be that the claim for attorney's fees should be considered to exist as of the date of the loan deed. But we have found no authority that accepts any such theory, and we cannot conceive of a theory so obviously at variance with the plain fact that it exists, if at all, only from the date of judgment in the state court.

Moreover it is a fact that the claim at the date of bankruptcy was contingent. It is well settled that claims that are

contingent at the time of bankruptcy cannot be paid. The following are authorities:

British & American Mortgage Co. v. Stuart, 210 Fed. 425; 5th Cir. C. C. A.

First Savings Bank & Trust Co. v. Stuppi, 2 Fed. (2nd) 822 (4).

McCabe v. Patton, 174 Fed. 217.

Hoffecker v. Smith, 294 Fed. 883 (3) 5th Cir.

Zavelo v. Reeves, 227 U. S. 628; 57 L. Ed. 678-9 (4).

In Re: Garlington, 115 F. 999—D. C. Tex.

In Re: Thompson, 144 F. 314, D. C. Tex.

In Re: Keeton, etc., 126 F. 426-429, D. C. Tex.

In Re: Muscott Steel Products Co., 294 Fed. 84.

In Re: Gebhard, 140 F. 571, D. C. Pa.

Remington, Section 809 and 2613.

2 Collier, page 1394.

In this connection it is proper to consider that attorney's fees which are contingent and which mature after bankruptcy are analagous to executory contracts, liability on which arise after bankruptcy, in instances such as rents under a lease, salary to be paid, or other cases arising under executory contracts. Under the bankruptcy law, such contractural rights are in effect abrogated by bankruptcy, and claims arising thereunder are not allowed. But it is not considered in such cases that bankruptcy fails to give effect to contractual rights in existence at the time of bankruptcy.

SECTION 47a, BANKRUPTCY ACT.

This section is in harmony with the general scheme of bankruptcy administration. The fact that the trustee is deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, de-

stroys the effect of an after acquired lien. While it is contended that the claim for attorney's fees takes its date from the loan deed and not from the judgment, yet this cannot be, because by Georgia Statute, Civil Code Section 4252, the claim for attorney's fees was void at the time of bankruptcy and will be noted that the statute is found in the code under the subject of Illegal Contracts. It was contingent upon being sued and collected by law, and so under bankruptcy the claim for attorneys being asserted herein on a judgment, the lien of which post-dated the lien of the trustee, could not take priority over the trustee's rights to the fund.

ATTORNEY'S FEES WERE NOT EARNED.

The contract to pay attorney's fees and the Georgia Statute referred to contemplates that the maker shall be liable to pay in addition to principal and interest, ten per cent if collected by law or through an attorney at law, (R25) after notice given in compliance with the statute.

The effect and intention of this contract is that the collection must be enforced by law. The state court action was not for the purpose of collection; the collection was made in the bankruptcy court. No attempt was made to collect on the fi fa except in the bankruptcy court, and none could have been made elsewhere as against the bankrupt.

In this case, the court will observe from the record, that the Security Mortgage Company had been made a party to a proceeding brought by the trustee, wherein a sale was about to be consummated, which sale later produced an amount in excess of all the principal and interest, and the Security Mortgage Company went into another court and filed suit, in which proceeding the attorney's fees claimed arose. This action violated the spirit and intent of the agreement, and created an additional indebtedness not contemplated or necessary, and the creditor should not be permitted to make a profit by collecting fees if he did not have to pay.

British American Mortgage Co., v. Stuart, 210 Fed. 427.

In Re: Harris 272 Feo. 351 (4).

CLAIMS ARISING AFTER BANKRUPTCY.

It is inconsistent with the Bankruptcy Act to recognize and pay a claim which arose after bankruptcy, regardless of Section 63a of the Bankruptcy Act.

See in this connection the following:

In Re: Vandiver, 210 Fed. 425—5th Cir. In this case the court said: (page 430): "We find no provision permitting the proof of a secured or unsecured claim which accrued after bankruptcy."

In Re: Weiland, 197 Fed. 116 (Ga.)

In Re: Ledbetter, 267 Fed. 893—D. C. Ga., "But if, after filing the petition in bankruptcy, the creditor elects to pursue to judgment his remedy in the State Court, instead of relying on that afforded by the bankruptcy court, costs subsequently arising are not provable and will not be allowed."

LIEN ASSERTED IN VIOLATION OF SECTION 67d OF THE BANKRPTCY ACT.

Collier on Bankruptcy in discussing Section Sixty-seven of the Act says: "Its various paragraphs and salient features make the section consistent and far reaching in the extreme." p. 1506. "'Good faith,' and 'not in contemplation of or in fraud upon the bankruptcy act,' are of the essence of this subsection without which the liens therein mentioned cannot be upheld even though there be a present consideration for them."

In this case, the very purpose of going to the state court for a lien for attorney's fees was to create a legal reason on which to base the additional claim when thereafter asserted in the Bankruptcy Court. The Security Mortgage Company knew that by asserting its claim simply on the notes and loan deed no attorney's fees could be collected. The plan was to

secure a judgment lien for the fees, and then file this as a lien against the property already in the hands of the trustee. The proceedings thereby were taken in contemplation of the bankruptcy, and in order to circumvent the bankruptcy, after obtaining jurisdiction in personam over the Security Mortgage Company, which we think violates section 67d and does violence to the spirit and intention of the entire Act.

In Re: Mobile Chair Mfg. Co., 245 F. 213.

SCOTT V. PAISLEY.

The Scott v. Paisley case, cited by counsel in their brief, does not contain the element which controls the case at bar. That case involved a constitutional question as to whether there had been due process of law as against the transferee of the equity in the land, who was not notified in a foreclosure of a loan deed brought only against the original maker of the note and loan deed. There was no bankruptcy law involved, and no exclusive jurisdictional question. It is true in this case, as in that, that the judgment against the Hanson Motor Company, the original maker, is good, but such judgment cannot bind or affect the land then under the exclusive jurisdiction of the bankruptcy court. So, we conclude, that the law as expounded in Scott v. Paisley, does not bear on the question now to be decided.

IN CONCLUSION

It is apparent that if the decisions of the District and Circuit Court of Appeals are reversed by this court, that it must be based on an entirely new line of legal reasoning, and that it would upset the established line of authorities, and generally create a chaotic condition effecting the system now being practiced in the administration of bankruptcy estates.

At the time of adopting the Federal Constitution the several states surrendered the right to Congress to establish a uniform

system of bankruptcys, and should it be contended that the state law is not being now recognized, so as to uphold the right to attorney's fees, the answer is that such state law must give way to the bankruptcy law.

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